No. 04-81

Supreme Court, U.S.
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In The
Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT FARMERS' SUPPLEMENTAL BRIEF OPPOSING PETITIONER BASF'S APRIL 27, 2005 SUPPLEMENTAL BRIEF:

- **EPA TO STATE REGULATORY OFFICIALS: *"IT IS RELATED TO A MARKETING STRATEGY AND IS NOT A REGULATORY MATTER"***
- **NORTH DAKOTA REGULATORY OFFICIALS TESTIFYING AT TRIAL ABOUT BASF'S LIES AND DECEIT: *"[I] CAN TAKE HARD ANSWERS, BUT DON'T LIE . . . JUST – YOU DON'T LIE"***
- **MINNESOTA SUPREME COURT: *"[F]ARMERS . . . CONSUMER FRAUD CLAIM IS NOT BASED ON BASF'S LABELS BUT RATHER ON FRAUDULENT MARKETING TECHNIQUES"***

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I. SUMMARY ARGUMENT

Respondents (Farmers) respectfully submit this supplemental brief opposing Petitioner's (BASF) Supplemental Brief (Supp. Br.) filed April 27, 2005 and served on Farmers' counsel mid-morning of April 28th. BASF's Supp. Br., ostensibly filed to address this Court's ruling in *Bates v. Dow Agrosciences*, LLC, No. 03-388 (U.S. Apr. 27, 2005), is a calculated and indecent misrepresentation of the record.

II. *BATES* HAS NO BEARING ON FARMERS' "FRAUDULENT MARKETING" CLAIMS WHICH INVOLVED LIES TO FARMERS AND STATE REGULATORY AUTHORITIES AND CONSIDERATION OF THE RISK OF FARMERS DISCOVERING THE TRUTH

A. BASF Pretends Jury Verdict And Seven Years Of Litigation Never Occurred

This case was ***tried to a 12-member jury for five weeks*** in November and December, 2001, with a unanimous finding that BASF engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or concealment of the truth" as part of its marketing scheme. *See* Farmers' Supp. Br. filed Feb. 9, 2005 at RFA (December 6, 2001 Special Verdict) (emphasis added); Clerk Doc. 575. The Minnesota Supreme Court observed there was evidence before the jury of BASF's ***"material [marketing] misrepresentations"*** and ***"less than candid responses"*** regarding the registration status of its products. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 63-64 (Minn. 2004) (emphasis added); *see also Peterson v. BASF Corp.*, 657

N.W.2d 853, 866 (Minn. App. 2003) (*Peterson II*) ("jury could conclude that BASF's ***marketing scheme*** ... concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the [New Jersey Consumer Fraud Act]") (emphasis added).

B. "It Is Related To A Marketing Strategy And Is Not A Regulatory Matter"

The Minnesota Supreme Court acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide – ***"a company marketing decision in which the EPA had no input."*** *Peterson III*, 675 N.W.2d at 70 (emphasis added); PX82; PX334 (***"it is related to a marketing strategy and is not a regulatory matter"***) (emphasis added).[1] There is absolutely no authority supporting BASF's disregard of the EPA's own statements in this case, or its claim that Farmers' "fraudulent marketing" claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[2]

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[1] PX82 is Plaintiffs' (Farmers) Trial Exhibit 82 presented to the jury (letter from EPA responding to North Dakota Department of Agriculture inquiry). PX334 is Farmers' Trial Exhibit 334 (confidential internal BASF memorandum to BASF management stating that EPA was upset that BASF had deceived the North Dakota Pesticide Control Board).

[2] This litigation is not unique. In the late 1990s several class actions of United States consumers with identical claims involving deceptive marketing of a federally-regulated product as different products for different uses, at widely-varying prices, were settled. *See Kropinski v. Johnson & Johnson*, Docket No. L-88886-96 (Sup.Ct.N.J. 1997), RFA255-58 (deceptive marketing of a contact lense as different lenses, and exploitation of FDA regulatory process, to exact a premium price from consumers); *Roberts v. Bausch & Lomb, Inc.*, Case No. 94-C-1144-W (N.D. Alabama

(Continued on following page)

C. "[I] Can Take Hard Answers, But Don't Lie . . . Just – You Don't Lie"

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), phytotoxicity of the product (whether it harms the target crop, *e.g., Bates*), or efficacy of the product (whether it kills target weeds). *Bates*, a crop injury case, has no bearing on Farmers' fraudulent marketing claims. *See* Farmers' Jan. 4, 2004 Supp. Br., pp. 6-7 (*BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud*).

1997), RFA268-78 (same); *Kramer v. Bausch & Lomb, Inc.*, Index No. 110972/95 (N.Y. App. Div. 1999), RFA260-67 (deceptive marketing of a contact lense solution as several different products, and exploitation of the federal FDA regulatory process, to exact a premium price from consumers). The published values of settlements to defrauded U.S. consumers: *Kropinski* ($840 million); *Roberts* ($67 million); *Kramer* ($12 million).

In a 1997 prosecution of Bausch & Lomb under consumer protection laws, Seventeen Attorneys General, in successfully procuring a cease and desist order, cast aside Bausch & Lomb's defense that the FDA had approved three different lense container (marketing) labels:

> 4. Bausch & Lomb: (a) represented, directly and by implication, that its practice of marketing identical contact lenses under different names and at differing prices was approved by the United States Food and Drug Administration ("FDA") or was due to the need to comply with FDA requirements governing the labeling of contact lenses, when in fact ***the FDA has neither approved nor required such Bausch & Lomb pricing and marketing practices*** and (b) ***by such false, misleading and deceptive representations violated the States' consumer protection laws.***

Farmers' Minnesota Supreme Court Brief at RFA191 (emphasis added).

The Minnesota appellate courts in *Peterson III* and *II* emphasized evidence before the jury that BASF lied to state regulatory authorities, food processors, farmers and others to conceal a federal regulatory action, namely, the EPA registration of Poast Plus herbicide for the same crops as Poast, using the same safety data. *See, e.g.*, PX334 (EPA was "***not pleased***" that BASF "***misdirected***" state regulatory officials) (emphasis added); Tr. 458:1-23 (BASF executive Chris Coombs at trial admitted ***false statements*** to North Dakota Pesticide Control Board but said he was told to make the statements by BASF senior management); Tr.1878:5-6;1559:16-25l;1566:17-25;1567:1;1681:17-25;1682:1-3 (North Dakota Agriculture Commissioner Sarah Vogel and Jack Peterson, former head of pesticide enforcement for North Dakota, bluntly and repeatedly testified at trial that BASF had lied to them: "***[I] can take hard answers, but don't lie. Just – you don't lie.***"). BASF threatened, encouraged and allowed the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." PX258;82;300. BASF's "confidential" internal memorandum described its marketing scheme as "***Opportunistic Exploitation***" of minor crop farmers. PX234 (emphasis added). BASF considered the "***risk***" of farmers discovering the truth, PX41 (emphasis added), and whether United States farmers could be "***controlled in future***" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered. PX247 (emphasis added).[3] BASF's management conceded during trial that BASF's marketing for Poast/Poast Plus was misleading:

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[3] BASF, through a personal telephone call from Executive William Wisdom, *maliciously threatened to personally sue North Dakota Agriculture Commissioner Vogel* after North Dakota took steps to address BASF's fraud. Tr.1758:15-1759:15.

A. (BASF's Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.

Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***

A. ***Yes, I would consider that.***

Tr.3588:15-24.

D. This Court In *Bates* Recognized – And EPA During Oral Argument Acknowledged – That Fraudulent Marketing Representations Are Not Preempted

This Court in *Bates* recognized that fraudulent marketing representations are not preempted. *Bates*, slip op. at 12, n. 17 ("To the extent that . . . fraud claims are based on oral representations made by Dow's agents, they [are not preempted]." The EPA through the Solicitor General, United States, acknowledged during January 10th oral argument in *Bates* that fraudulent marketing representations are not preempted: "[W]e agree that . . . off-labeled, false misrepresentation[s] [are] . . . not preempted." Tr. 43:4-7 (question by Justice O'Connor and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).

E. Nothing About The Jury Verdict Requires BASF To Do Anything Other Than Honestly Market Its Product

This Court in *Bates* stated:

> Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for "labeling and packaging."

Bates, slip op. at p. 11.

Consumer fraud statutes, applied to fraudulent company marketing schemes, likewise do not impose requirements as to "labeling and packaging." Rather, consumer fraud statutes, like the New Jersey Consumer Fraud Act (NJCFA), impose a duty upon global chemical companies to honestly market their product. Farmers argued, and the unanimous jury on December 6, 2001 found, that ***BASF violated its duty of honesty in the marketing of its herbicide***. Nothing about the jury verdict requires BASF to do anything other than ***honestly market its product***.

F. BASF's Complaint That The Jury Was Not Instructed On FIFRA Requirements Grossly Misrepresents The Record

The Minnesota appellate courts readily understood that this case presents *no* genuine issue of fact concerning whether BASF complied with the EPA regulatory processes. The Minnesota courts succinctly captured the heart of the dispute:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The Court of Appeals agreed. It held that "the Farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging."

Peterson III, 675 N.W.2d at 70. The ***only*** issue for the jury was whether BASF's marketing and pricing schemes violated the NJCFA. *Peterson I*, 618 N.W.2d 821, 824 (Minn. App. 2000) (BASF's focus on the EPA statutes and regulations is "*misplaced*" and there was "a genuine issue of material fact . . . as to whether BASF's *system of deceit* falls within the broad protection of the [NJCFA].").

G. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' fraud claims were based on BASF's "marketing scheme" and were not based on "technically accurate" product labels. *Peterson II*, 657 N.W.2d at 865. During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's EPA regulatory expert – Daniel Barolo

> Q. And the same thing would be true of ***a company who went through all the process of registering a crop with both the EPA***

and states, they could still commit consumer fraud.

A. ***I presume they could.***

Tr.2493:3-5;2493:19-25;2494:1-5.

BASF's marketing expert – Dr. Dale Dahl

Q. Okay. ***So patents, consumer fraud, doesn't cover it. Registration, consumer fraud doesn't cover it. Differential pricing, consumer fraud doesn't cover it. In other words, you're not protected from committing consumer fraud.***

A. ***Right.***

Tr.3352:12-17.

BASF's management – William Wisdom

Q. And ***you will agree and tell the jury that the EPA does not concern itself with BASF's marketing practices, does it?***

A. ***That's correct.***

Q. ***But consumer fraud laws do, don't they?***

A. ***Yes, sir.***

Q. ***The EPA registration process that we have been talking about does not concern market[ing]; right?***

A. ***That's correct.***

Tr.1017:7-15.

III. THIS COURT SHOULD DENY BASF'S INJUDICIOUS PETITION

There is no basis to hold BASF's petition or remand the petition to the Minnesota Supreme Court. The EPA firmly declared to North Dakota regulatory officials upon inquiry that BASF's fraudulent "marketing" scheme was not in the EPA's purview and not preempted. The jury verdict and established facts, the Minnesota courts and common sense, unanimously declare likewise. Farmers ask this Court to promptly deny BASF's injudicious petition.[4]

Respectfully submitted,

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[4] Eleven unanimous Minnesota appellate judges in three published opinions – *Peterson III*, *II* and *I* – have studied the facts of this case as determined by the jury and unanimously rejected BASF's frivolous federal preemption defense.